Supreme Court, U.S.
FILED
OCT 28 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 35, Original. (4)

In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE OF MAINE, ET AL.,
DEFENDANTS.

(MASSACHUSETTS BOUNDARY CASE)

ON REPORT OF THE SPECIAL MASTER.

Reply Brief of the Commonwealth of Massachusetts.

FRANCIS X. BELLOTTI,
Attorney General,
HENRY HERRMANN,
Special Assistant Attorney General,
WILLIAM L. PARDEE,
Assistant Attorney General,
Government Bureau, Rm. 2019,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1014
Counsel of Record

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

BEST AVAILABLE COPY

Table of Contents.

Introduction 1

I. The validity of the doctrine of ancient title 2

A. Ancient title is a legitimate doctrine for delimiting coastal waters under the Convention 3

B. Ancient title is not contrary to the contemperaneous law of England, or incompatible with freedom of the seas 7

1. Massachusetts' claim is unrelated to the discredited Stuart claims 7

2. The Crown's acquisition of the Sound by discovery and occupation did not contravene the doctrine of freedom of the seas 9

3. Perfected titles to inland waters were not divested by the doctrine of freedom of the seas 12

II. The "threshold questions" raised by the United States 14

A. The applicability of the *inter fauces terrae* doctrine to Nantucket Sound 14

B. There was effective occupation of the Sound 16

III. The allegation of "lapse" resulting in abandonment or relinquishment of a perfected ancient title 19

A. "Passive" abandonment 24

B. The United States' argument of abandonment by affirmative acts since Independence 28

1. Alleged abandonment by the United States 29

2. Allegations that Massachusetts itself disclaimed title to Nantucket Sound 35

3. The record contains evidence contradicting the United States' argument 39

Conclusion 43

Table of Authorities Cited.

Cases.

Commonwealth v. Peters, 53 Mass. (12 Metc.) 387 (1847) 15

Mahler v. Norwich and New York Transp. Co., 35 N.Y. 352 (1866) 5n, 14n, 26, 30

Manchester v. Massachusetts, 139 U.S. 240 (1891) 5n, 6, 7n, 29n, 30n et seq.

Martin v. Waddell, 41 U.S. 367 (1842) 6, 12n

Opinion of the Attorney General, 1 Op. Atty. Gen. 32 (1793) 7n

Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845) 6n

United States v. California, 381 U.S. 139 (1965) 29, 32

U.S. v. Grush, 26 F.Cas. 15,268 (1829) 14n, 29

United States v. Louisiana (Mississippi Sound Case), 105 S. Ct. 1074 (1985) 2, 25

United States v. Maine, et al., 423 U.S. 1 (1975) 7n, 9

Special Master Reports.

Fifth Report of the Special Legislative Commission on Marine Boundaries and Resources, 4 Sen. Rep. 1580 (Sept. 20, 1971) 39n

Statutes and Treaties.

Statute 1971, c. 1035 39

Convention on the Territorial Sea and Contiguous Zone, Article 7 2, 4

International Legal Materials, Vol. VII, pp. 633 17n

Miscellaneous.

Anglo-Norwegian Fisheries Case, [1951] I. C.J. Reports 116 15

1 D.P. O'Connell The International Law of the Sea 13 (1982) 18

1 Hackworth, Digest of International Law 442 23

1C. Hyde, International Law, § 151(c) at 508 6, 23, 27, 40, 42

4 M. Whiteman Digest of International Law, 339-340 (1965) 15

Brownlie, *Principles of Public International Law* 103 (2d ed. 1973) 5, 11, 17n, 18, 23 et seq.

Burrill's Collection of Definitions of Toponymics Generics, Mass. Ex. 22 14n

Case of the Minquiers and the Ecréhos, [1953], I.C.J. Reports 47 24, 25

Eastern Greenland Case, P.C.I.J. Ser. A/B, no. 53, 52 (1933) 24, 25

Fitzmaurice, 30 B.Y.I.C. 5 (1953) 4n

Fitzmaurice, The Law and Procedure of the International Court of Justice, 32 B.Y.L.C. 20, 66 (1955-56) 22, 24

Fulton, the Sovereignty of the Sea (1911) 8, 13, 19n, 39

"Juridical Regime of Historic Waters, Including Historic Bays," [1962] 2 Y.B. Int'l. L Comm'n 1, U.N. Doc. A/CN.4/142 (1962) *passim*

Moore, Digest, § 153 at 7348 39

Pearcy, Measurement of the U.S. Territorial Sea, 40 Dept. St. Bull. 963 (1959) 33, 34, 35

Y. Blum, Historic Titles in International Law 242 (1965) 11, 12, 13

No. 35, Original.

In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE OF MAINE, ET AL.,
DEFENDANTS.

(MASSACHUSETTS BOUNDARY CASE)

ON REPORT OF THE SPECIAL MASTER.

Reply Brief of the Commonwealth of Massachusetts.

Introduction.

The Special Master has found that Massachusetts, as successor to the Crown, has established a claim to a perfected ancient title to Nantucket Sound, subject only to the application of a burden of proof less onerous than "clear beyond doubt." That was, and remains, the essence of our position at this stage of these proceedings.

The United States argues in a somewhat fragmented fashion that no ancient title was perfected and that, if it was, it was abandoned, actively or through inaction. The first portion of our response is devoted to a rebuttal of the United States' attack on the perfection of the title. We then proceed to address what the United States has characterized as "threshold questions." In Part III, we proceed to rebut the United States' attack on the *retention* of our ancient title, once perfected. In essence, our position is that the Master's findings dealing with "lapse" refer not to the retention of a perfected non-prescriptive *ancient* title, but, rather, to the ripening of a claim to a prescriptive *historic* title. The United States, we submit, has confused these totally separate analyses, as it has the evidence it discusses, which has more to do with historic than with ancient title. We argue below that international law requires certain prerequisites for the abandonment of a vested ancient title, and the record in this case does not manifest them.

I. The Validity of the Doctrine of Ancient Title.

Massachusetts asserts that it has an ancient title to Nantucket Sound. The Special Master found the doctrine of ancient title to be valid under international law, and applicable to a "historic bay" determination under Article 7 of the Convention on the Territorial Sea and Contiguous Zone (the "Convention"), pursuant to the analysis in the "Juridical Regime of Historic Waters, Including Historic Bays," [1962] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/142 (1962) (the *Juridical Regime*), a study which the Court has characterized as "authoritative." *See United States* v. *Louisiana (Mississippi Sound Case)*, 105 S.Ct. 1074, 1080 (1985).

The United States neither accepts nor forthrightly rejects the doctrine of ancient title.[1] Instead, it purports to accept the doctrine, as explicated by the Special Master, while sniping at it from footnotes. Nevertheless, the doctrine is a part of international law, and, as the Special Master found, is applicable to Nantucket Sound.

A. *Ancient Title Is a Legitimate Doctrine for Delimiting Coastal Waters Under the Convention.*

The United States implies that there is something vaguely "alien" about the concept of ancient title. *See, e.g.*, Reply Brief at 3 ("We are warned to be cautious in accepting a claim so founded by the fact that there is no American precedent for it"), 6 ("There is no precedent in this country for such a claim"). As the United States has itself pointed out, Reply Brief at 23, and as the Special Master observed, Report at 4-5, this Court has determined that these federal-state seabed con-

---

[1] At one point in its Reply Brief, the United States appears to admit the legal validity of the doctrine: "It is true that ancient title, 'so-called', is originally a lawful appropriation, not a usurpation conferring rights by adverse possession of an area appertaining to others, and that such a claim is complete by occupation and does not require time to ripen by prescription." Reply Brief at 16. Further, the United States seems to admit the existence of ancient seabed title with respect to sedentary fisheries. Reply Brief p. 8 n.6.

However, at other places, the United States repeatedly evidences displeasure at the name "ancient" without clearly articulating why. *See* Reply Brief at 3 ("the so-called doctrine of ancient title"), at 8 ("a title — whether or not properly labelled "ancient"), at 16 ("ancient title, so called"). "Ancient" is the term employed by publicists, international tribunals, and by the *Juridical Regime* to denote the doctrine in question. As the United States well knows, the term, as far as territory is concerned, has no necessary reference to ancient or classical civilizations. It merely signifies that the title was perfected prior to the particular territory becoming subject to the doctrine of freedom of the seas. *Juridical Regime*, ¶ 71. Since everyone knows what is meant, the United States' apparent objection to the term "ancient" seems a sterile quibble.

troversies are to be resolved by reference to the Convention. It is undisputed that the Convention provides for "historic bays" in Article 7(6). What constitutes the basis for "historic bays" (undefined in the Convention) has been repeatedly evaluated by this Court by recourse to the *Juridical Regime*. The *Juridical Regime* identifies both "historic" and "ancient" title as a basis for historic bays treatment. Accordingly, "ancient" title is no more alien than "historic" title. The Court's adoption of this area of international law renders it, despite the United States' misgivings, the law of this country.

This also disposes of the United States' argument, Reply Brief at 16, that "ancient title is relied upon only when the claim is inconsistent with modern legal standards." Once an ancient title is perfected, according to the legal standards then prevailing,[2] it is *entirely* consistent with modern legal standards, since the applicable provision of the "modern" Convention, construed in light of the *Juridical Regime*, identifies ancient title as one basis for historic bays treatment. The United States' argument is, therefore, simply illogical.[3]

Aside from the United States' complaint that there is no "American" precedent for ancient title, the United States also implies that Massachusetts is wrong in resting its claim on a title established as far back as colonial times.[4]

---

[2] Under the doctrine of "inter-temporal law," where the rights of parties are dependent on events or treaties of considerable distance in time, "It can now be regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today." Fitzmaurice, 30 B.Y.I.C. 5 (1953).

[3] The United States' analogy to grandfathered non-conforming uses betrays the same fallacy. Further, "uses," not "titles," are "grandfathered." It is of the essence of our argument, of course, that an ancient title was previously *perfected*. Thus, the United States' analogy to zoning law is mistaken.

[4] *See, e.g.*, Reply Brief at 24 (reference to "the archaic Massachusetts claim").

The response is simple: since ancient title cannot vest subsequent to the establishment of the regime of freedom of the seas (*Juridical Regime* ¶ 71), an ancient title, by its nature, must have been perfected a long time ago. The age of the claim does not justify distrust, for, as Brownlie has said, "Even in the case of the acquisition of territory belonging to no state (*terra nullius*), while this may not occur currently, the relevance and existence of such occupation in the past are often issues in existing disputes. *Legally relevant events may have occurred centuries ago.*" Brownlie, *Principles of Public International Law* 103 (2d ed. 1973) (emphasis added).

Finally, the United States expresses dismay at the concept that "a complete and perfect title to the Sound was lawfully acquired by the Crown during colonial times and bequeathed to the State — which could enjoy the inheritance without further ado." Reply Brief at 6. Putting aside the rhetorical use of the terms "bequeathed" and "inheritance," that is indeed the case. It is well settled that whatever territory the British sovereign possessed at Independence was ceded by virtue of the Treaty of Paris in 1783.[5] In 1856, the Secretary of State forcefully expressed the matter as follows:

> The United States regard it as an established principle of international law and of international right, that when a European Colony in America becomes independent, it succeeds to the territorial limits of the Colony as it stood in the hands of the parent country. That is the doctrine which Great Britain and the United States concurred in adopting in the negotiations of Paris, which terminated this country's War of Independence. . . . No other principle is legitimate, reasonable, or just.

---

[5] See *Manchester* v. *Massachusetts*, 139 U.S. 240, 256-257 (1891); *Mahler* v. *Norwich and New York Transp. Co.*, 35 N.Y. 352, 355 (1866).

1C. Hyde, International Law, § 151(c) at 508. Therefore, if the title was perfected, and if the territory in question was inland waters,[6] then it did indeed belong to Massachusetts "without further ado."

There is no doubt about the international legal status of the Northeastern American coast at the time of discovery. That territory was *res nullius*, and capable of possession by discovery, fortified by occupation. This Court in *Martin* v. *Waddell*, 41 U.S. 367 (1842), ruled that "The English possessions in America were not claimed by right of conquest but by right of discovery." *Id.* at 409. It is clear that title by discovery could only be obtained with respect to *res nullius*: while one can "discover" another sovereign's territory, that does not yield a title thereto.

The Master found that the two royal charters in question *did* encompass Vineyard and Nantucket Sounds. Report at 38-43. That finding was amply justified. Indeed, this Court ruled that Buzzards Bay (adjacent to Vineyard Sound) was granted to Massachusetts by means of its colonial charter. *Manchester* v. *Massachusetts*, 139 U.S. 240, 256 (1891). Since royal title to Buzzards Bay *must* have been acquired by

[6] The title to the seabed of inland water belongs, constitutionally, to the several states, and not the federal government. *Pollard* v. *Hagan*, 44 U.S. (3 How.) 212 (1845). The United States argues that *Pollard* "does not tell us which are 'inland waters' for constitutional purposes." Reply Brief at 23. While that standard is provided, in this context, by the Convention, it seems clear that according to *Pollard*, the determination of "inland status" of necessity results in the vesting of seabed title in the contiguous State of the Union.

In this connection, the United States makes the circular argument that the surrender of the states' rights in the marginal sea to the United States upon acceding to the Union, cannot be defeated by labelling as "inland" waters which are "part of the marginal sea or the high seas under federal law." Reply Brief at 12-13. We might respond that the United States' labelling of the Sound as marginal sea should not be permitted to contract Massachusetts' territory. In the end, neither contention is likely to assist in the task before this Court, namely, to determine whether the area in controversy is "inland."

discovery and subsequent occupation and the application of the line of sight test (the only British method for delimiting waters within the realm at the time), it is hard to explain (and the United States has not tried) why the Crown should not have acquired Nantucket Sound by like means and passed it to Massachusetts by the same legal and political instrument.[7]

B. *Ancient Title Is Not Contrary to the Contemporaneous Law of England, Or Incompatible with Freedom of the Seas.*

1. Massachusetts' Claim Is Unrelated to the Discredited Stuart Claims.

In a lengthy footnote early in its brief, the United States once again seeks to create the impression that the doctrine of ancient title was and is incompatible with English law. Reply Brief at 6-7 n.5.[8] This matter was extensively briefed to the Special Master, and he found against the United States after a careful discussion. Report at 27-37. But the United States repeats the same argument, and cites the same authorities out of context.

The United States asserts that "nothing remains of maritime titles asserted in the 17th and 18th Century." Reply Brief at 6

[7] See also *Manchester*, 139 U.S. at 256-257. There is no serious question that "straits" were capable of expropriation by the coastal state. *See* Opinion of the Attorney General, 1 Op. Atty. Gen. 32 (1793) discussed in Report at 35-38. Indeed, in an earlier stage of this case, the United States argued that the colonial charters granted "rights to the Mainland (*including inland waters such as bays, gulfs and inlets*)." Post Trial Brief for the United States before the Hon. Albert B. Maris, Special Master, *United States* v. *Maine, et al.*, at 123 (emphasis added). In this phase of the case, the United States has argued the contrary, but the Special Master rejected the argument, with good reason. Report at 42.

[8] Although we shall discuss this footnote at length, we note at the outset that the United States resorted to the identical tactic before the Special Master. *See* Report at 26.

n.5. In itself improbable — for the United States can hardly intend to repudiate the historical basis of title to Long Island Sound, Delaware Bay, and Chesapeake Bay — this assertion is unsupported by the authorities cited.

What Messrs. Root and Fulton refer to in the passages selected by the United States are the grandiose medieval claims to broad areas of open ocean (such as, for example, the British claim to all of the English Channel, or the now long discarded Stuart claim to huge ocean areas). *See, e.g.*, Fulton, The Sovereignty of the Sea (1911), frontispiece, ("the 'British Seas,' according to Selden") (Mass. Ex. 155). They were clearly not referring to waters *inter fauces terrae*. For example, as the United States well knows, Fulton plainly states that the doctrine of county waters within headlands was still a vital principle of British law at the end of the Nineteenth Century. *See* Fulton at 593. *See also id.* at 547, *quoted in* Report at 31.

Similarly, the United States repeats its argument that Judge Maris in his 1974 Report in this case concluded that the states "may not rely on discredited pretensions of the Stuart reign." Reply Brief at 6-7 n.5. Massachusetts does not rely on those pretensions. Rather, as the Special Master found, "the county waters doctrine on which Massachusetts relies both predated and survived the Stuart period and remained viable in both English and American legal doctrine well into the nineteenth century." Report at 37. Although the United States has repeatedly sought to tar Massachusetts' title with this brush, it has never attempted by legal or historical analysis to demonstrate a connection between the *inter fauces terrae* principle and the Stuart claims. Indeed, the United States has trenchantly argued the opposite view before this Court in this very case:

> during the period of the so-called "older legal tradition" English law denied the concept of property ownership of the adjacent seas or the seabed. On the other hand, English law has traditionally provided that the common law holds jurisdiction over the arms of the sea where a man could see to the far shore. . . . Those waters have always been viewed as within the boundaries of counties, where, for example a coroner could by virtue of his common law jurisdiction investigate a death on a ship — which he could not do if the ship were on the high seas. . . . English law has always recognized the rights of the Crown in these waters both for purposes of fishing and navigation and in a property sense. The crown could and did grant rights to the sea and subsoil within such bays and inlets.

United States v. *Maine, et al.*, Reply Brief of the United States before the Honorable Albert B. Maris, Special Master, at 17-18 (citations omitted), *cited in* Report at 30 n.9.

2. The Crown's Acquisition of the Sound by Discovery and Occupation did Not Contravene the Doctrine of Freedom of the Seas.

The United States asserts that neither Massachusetts nor the Special Master "addresses the historic fact that, except for the relatively brief period of excessive Stuart pretensions," freedom of the seas has been the prevailing international law regime since several centuries before the alleged appropriation of Nantucket Sound. . . ." Reply Brief at 7. Massachusetts not only addressed this allegation, but briefed the Special Master in detail, from which we excerpt the following:

> The crucial factor, therefore, in evaluating whether the evidence marshalled by Massachusetts

supports a claim to "ancient title" within the meaning of the special category discussed in paragraph 71 of the U.N. Study is whether Massachusetts' title antedates the freedom of the seas regime. To establish that it does, we provide the following summary of the chronological development of the freedom of the seas regime:

> The modern law governing the high seas has its foundation in the rule that the high seas are not open to acquisition by occupation on the part of states individually or collectively: it is *res extra commercium*. Historically the emergence of the rule is associated with the rise to dominance of maritime powers and the decline of the influence of states which had favored closed seas. . . . After 1609 Stuart policies extended the principle of closed seas from Scotland to England and Ireland, and the political concept of the 'British Seas' appeared. The areas claimed extended to the opposite shores of the Continent. The seventeenth century marked the heyday of the *mare clausum* (closed sea) with claims by England, Denmark, Spain, Portugal, Genoa, Tuscany, the Papacy, Turkey, and Venice.
>
> In the eighteenth century the position changed completely. Dutch policies had favored freedom of navigation and fishing in the previous century, and the great publicist Grotius had written against the Portuguese monopoly of navigation and commerce in the East Indies. After the accession of William of Orange to the English throne in 1689 English disputes with Holland over fisheries ceased. However, sovereignty of the sea was still asserted against France, and in general the formal

> requirement of the salute to the flag was maintained. By the eighteenth century the claim to sovereignty was obsolete and the requirement of the flag ceremony was ended in 1805. . . .

Brownlie, *Principles of Public International Law* (2d ed. 1973).

Massachusetts' position on this issue, it might be added, is squarely in accord with that of Blum, who is quoted at length in the United States' Reply Brief at 7, n.5, and who, as the Special Master noted, was the *only* source cited by the United States in opposition to the ancient title doctrine. Report at 26. What the United States has failed to point out to the Master or to the Court is that Blum himself states that the doctrine of freedom of the seas became a generally accepted principle of international law only in the *first half of the nineteenth century*. Y. Blum, Historic Titles in International Law 242 (1965).[9]

To conclude this part of the discussion we point out as we did to the Special Master that

> Under English law, geographically circumscribed coastal bodies of water have always been considered apart from the open sea as far as the jurisdiction and prerogatives of the Crown were concerned. Even at

[9] In § 61 (entitled: "The impact of the principle of the freedom of the high seas on the formation of maritime historic rights"), Blum states,

> Whatever the reason for their divergence of opinion as to the precise legal status of the high seas, it is an undeniable fact that, since the days of Grotius, the principle of freedom of the high seas formed an ever wider currency and that, after a gradual evolution, it gained the upper hand towards the beginning of the nineteenth century, when it crystallized into a universally accepted principle of international law.

> the height of the doctrinal and political battle over the freedom of the seas in the 17th Century (with Selden's *Mare Clausum*, stating the case for England, and *Grotius' Mare Liberium* for Holland) the advocates of freedom of the seas readily conceded that such principle does not apply to coastal waters: "The issue does not concern a gulf or a strait in this ocean, nor even all the expanse of sea which is visible from the shore." *Grotius' Mare Liberum* (Magoffin edition 1216) 37.

Post-Trial Memorandum for the Commonwealth at 40-41.

3. Perfected Titles to Inland Waters Were Not Divested By the Doctrine of Freedom of the Seas.

The United States quotes Blum at length to support an assertion that because of freedom of the seas, ancient title doctrine cannot form the basis for a present claim of title. Reply Brief at 7 n.5. See also Report at 26. Our first point is that is not what Blum *says*; this statement has been quoted out of context. Immediately preceding the passage quoted, Blum refers to "immemorial possession," which he explains as meaning that "the origins of the claimant State's pretensions to the territory in question cannot be traced." Blum at 250. We have not relied on the vague concept of "immemorial possession" (a concept which the *Juridical Regime* at ¶¶ 66, 104 deprecates). Rather, the "origins" of our claim can be established with great specificity: *discovery* (by Peter Gosnold in 1602)[10] followed by *occupation* (*see* Report 51-58) and *political assertion* by means of the Royal Charters (Report at 38-43).

[10] *See also Martin* v. *Waddell*, 41 U.S. at 409: "The English possessions in America were not claimed by right of conquest but by right of discovery."

Second, while it is not quite clear what Blum had in mind when he referred to "extensive medieval pretensions," he clearly could not have been referring to the county waters doctrine, which was alive and well in the later Victorian era (*see* Fulton at 547, *discussed* in Report at 31-32), and survived into the twentieth century. (Fulton published in 1911 and he does not report any change in the law). Blum might have been referring to the early British claims to vast expanses of open sea, including the English Channel up to the French coastline. Those claims, however, have no kinship with the county waters doctrine.

Finally, it must be said that Blum's position there expressed as to the need to "reacquire" maritime territory after the beginning of the eighteenth century is an isolated, even unsubstantiated viewpoint in international law.[11] Indeed, in the next section of his work, concerning "Manifestation of State authority over Maritime Areas," Blum cites Attorney General Randolph's opinion concerning Delaware Bay as an example of an assertion of sovereign authority. *Id.* at 259. That opinion was based on events dating "from the establishment of the British provinces . . . ." And yet, under Professor Blum's theory, if he had applied it (as he did not) to this historic title, the United States would have had to "reacquire" its title *de novo*, with the acquiescence of foreign nations, *after* the date of the opinion in 1793, given Blum's viewpoint as to the operative date of freedom of the seas. In short, Blum's position is conceptual and practical nonsense.

[11] For instance, Blum cites not a *single* authority in the discussion from which the United States quotes. *See* Blum at 248-250.

II. The "Threshold Questions" Raised by the United States.

A. *The Applicability of the* Inter Fauces Terrae *Doctrine to Nantucket Sound.*

Disagreeing with the Special Master (who allegedly was "too quick" in accepting the Massachusetts position), the United States argues that the waters of Nantucket Sound would not have qualified as *inter fauces terrae*, and, therefore inland, during the colonial period. Allegedly, Nantucket Sound does not qualify because it "is in no sense a bay[12] or estuary or gulf whose waters lie sheltered 'between the jaws of the land,' culminating in mainland headlands." Reply Brief at 9. But this argument is insufficient, because it assumes what is still to be proven, namely that county waters must lie between mainland headlands. (Obviously, two of the Nantucket Sound headlands are indeed on the mainland).

The argument, further, is based upon a too literal translation of a medieval Latin metaphor. The colorful expression "within the jaws of the land" has never been given so literal a meaning as the United States invites the Court to do. Rather, it has been understood as, pure and simple, a headlands theory: the "fauces" are headlands, and there is no requirement they be on the mainland.[13]

[12] Massachusetts, incidentally, introduced uncontradicted expert testimony and documentary evidence that an older use of the word "bay" was a generic term including "sounds." See Tr. at 962-969. *See also Burrill's Collection of Definitions of Toponymics Generics*, Mass. Ex. 22, quoting *Topographic Terms in Virginia*, an influential geographic lexicon of the federal period defining a "bay" inter alia, as a "sound."

[13] See, for example, the description in *Mahler*, 35 N.Y. at 355-356, of the small islands at the eastern entrance of Long Island Sound (not Long Island itself) constituting the "fauces terrae" of the Sound. *See also U.S.* v. *Grush*, 26 F.Cas. 15,268 at 52 (1829) referring to the islands fringing Boston Harbor as the *fauces terrae*.

The word "land" has been used indiscriminately in the singular and plural to refer to the same geographic phenomena. The first expression of the rule in 1308, Report at 44, refers to sight "from one land to the other." In *Commonwealth* v. *Peters*, 53 Mass. (12 Metc.) 387, 392 (1847), the word is in the plural: "between lands not so wide but that . . . ." In the *Anglo-Norwegian Fisheries Case*, the court referred to the waters in question as being "*inter fauces terrarum*" since they were enclosable by lines drawn from headland to headland on innumerable islands off the coast. [1951] I.C.J. Reports 116, 130.[14]

Lest the United States now argue that the Latin plural "terrarum" is applicable *only* to islands and not to mainland headlands, it must be noted that the International Law Commission, in its 1956 codification proposal, after considerable study, proposed that Article 13 provide: "If a river flows directly into the sea, the territorial sea shall be measured from a line drawn *inter fauces terrarum* across the mouth of the river." The Commission noted that it had taken the Latin term from the *Anglo-Norwegian Fisheries Case*. See 4 M. Whiteman, Digest of International Law, 339-340 (1965). The headlands of a river mouth, although clearly mainland, thus can be designated as "terrae" or "terrarum." In sum, the *fauces* (headlands) may be

[14] The International Law Commission has summarized as follows the Court's use of the term *inter fauces terrarum*:

> [T]he Latin expression inter fauces terrarum . . . was used by the International Court of Justice in the Fisheries case in the following context. The question was whether Norway could draw straight lines only across bays or also between islands, islets and rocks, across the sea areas separating them, even when such areas did not fall within the conception of a bay. In the Court's view it was sufficient that the areas of sea across which the straight lines were drawn should be situated between the island formations concerned, inter fauces terrarum. [1951] I.C.J. Reports at 130.

on the mainland or on islands. If the distance between them meets the line of sight test, then any arm of the sea[15] within the *fauces* is inland.

B. *There Was Effective Occupation of the Sound.*

The United States further argues that no ancient title was ever perfected because of the alleged failure to show any effective occupation of Nantucket Sound. Reply Brief at 10. The United States seems to suggest that the Special Master found in its favor on this issue. In fact, he unequivocally ruled against the United States: "The Special Master therefore concludes that Massachusetts has introduced sufficient evidence to support a finding that the nature and extent of the colonists' exploitation of the marine resources of the sounds was equivalent to a formal assumption of sovereignty over them." Report at 58.[16]

The United States suggests that, in making this finding, the Special Master was "briefly distracted" by what it considers irrelevant evidence. Reply Brief at 10. However, the finding followed the Special Master's exhaustive analysis of the truly voluminous evidence on this issue. Report at 51-58.

The United States argues that the colonists' exploitation of the Sound cannot, in and of itself, constitute a basis for a historic (prescriptive) title. The question, however, is not

[15] The argument by the United States is also intertwined with its repeated (and unsuccessful) argument that the term "arm of the sea" does not encompass "sounds" or "straits," but this position was rejected by the Special Master based on ample evidence introduced by Massachusetts. Report at 43 n.19.

[16] It is noteworthy that the Special Master found that the colonists' occupation of the Sound could also form the basis of an historic title claim. See Report at 27. The United States confuses the Special Master's discussion of why that factor does not suffice at present for a *historic* title claim, Report at 64-66, with his discussion of whether there had been a perfected *ancient* title claim. Report at 27-51. This crucial distinction, and the United States' attempt to blur it, is discussed at length below.

whether the colonists' activities qualify as prescriptive acts, but whether an ancient title was perfected prior to Independence. The physical and political acts considered in that context have nothing to do with prescription *in any sense*, but fortify a title first obtained by discovery over what was once *res nullius*.

The Special Master's conclusion correctly followed international law. In the correct (nonprescriptive) context, the colonists' exploitation of the entire Sound was not "entirely private activities" as the United States claims. Rather, such intensive and exclusive exploitation of a geographically distinctive marine area surrounded by contiguous land masses under the undisputed political and military control of one sovereign must be considered together with the undisputed fact of initial claim by discovery, coupled with political assertion of ownership and jurisdiction (the colonial charters) and a juridical regime which would enclose those waters (the *inter fauces terrae* doctrine). This well documented matrix of historical factors amply satisfies, we submit, the accepted international law intention that factors of occupation cannot be evaluated individually and in isolation (as the United States suggests) but, rather, must be considered in view of all the circumstances.[17]

There is a further reason why the United States errs in criticizing the Special Master for relying on alleged "entirely private activities." However those acts would be classified today, in their historical context, it is an error to characterize them as wholly private. In the *Rann of Kutch Award* (India and Pakistan) (1968),[18] a boundary dispute concerning a dry

[17] It should also be noted that the issue whether there was occupation sufficient to perfect the ancient title must be determined in light of the legal tests accepted at that time. The older view favored precisely the factors Massachusetts has adduced: "The older works on international law give the nineteenth century view of occupation in terms of settlement and close physical possession." Brownlie at 144.

[18] International Legal Materials, Vol. VII, pp. 633, 673-675.

lake bed, a tribunal of eminent international law experts "remarked that in an agricultural and traditional economy, the distinction between state and private interests was not to be established with the firmness to be expected in a modern industrial economy. In an agricultural economy grazing and other economic activities by private land holders may provide evidence of [national] title." Brownlie at 146 (footnote omitted).

The pertinent discussion in the *Rann of Kutch Award* focused on the commingling of the direct proprietary interest of the sovereign in the means of economic subsistence with the sovereign's political governmental character. In other words, the decision recognized a fusion of the political and proprietary capacity of the sovereign in a primitive economy, which is not found in a modern free enterprise state. This analysis is plainly applicable to the evidence of the colonial history of the Sound. The first factor is the existence of the *proprietary* form of government in the first stages of colonization, with an interesting late survival of that form on Nantucket. See Tr. 1083-1084 (Dr. Louis DeVorsey). *See also* Massachusetts Exhibit 98. Second, at the time, there was unanimity that sovereignty over coastal waters such as sounds was *proprietary* rather than merely jurisdictional. "No matter how it was philosophically established, the view was universally held in 1700 that every coastal state had a natural right to property in the sea as far as it effectively occupied it." 1 D.P. O'Connell The International Law of the Sea 13 (1982). The occupation of the Sound, which the colonists exploited intensively and exclusively as a means of economic survival, see Report at 51-58, was therefore a matter of a permitted exploitation of the sovereign property for a joint benefit (just as in the *Rann of Kutch*). *See, e.g.*, Massachusetts Exhibit 79 (early legislation referring to sedentary fisheries as the "*property*" of the colony and its subdivisions).[19]

[19] This evidence, we submit, is especially significant since sedentary fisheries, as the United States admits, are an established means of gaining ancient title

Considered in isolation therefore (and we have explained above why they should not be), the economic activities which the United States singles out might, with some justification, be termed "entirely private activities" in a modern sense with regard to the elements of a *prescriptive* title. In the relevant historical and legal context, however, that is an incorrect characterization. The Special Master was justified in finding that an ancient title had been perfected, based upon contemporaneous legal standards, prior to independence.

III. The Allegation of "Lapse" Resulting in Abandonment or Relinquishment of a Perfected Ancient Title.

The United States says that the Special Master found that "any earlier title to the area has long since lapsed." The Special Master made no such finding. Rather he found (and Massachusetts has not excepted thereto) that the alternative claim to historic title had lapsed. *See* Report at 64-66. The distinction is absolutely crucial, and the United States has attempted to blur it with a verbal sleight of hand.

The Special Master correctly pointed out that

> Massachusetts argues that its claim to the two sounds rests on two independent and alternative bases: (1) historic title and (2) ancient title.

Report at 25. He first analyzed the "validity of the distinction between historic title and ancient title" and found the distinction

to a seabed. Reply Brief at 8 n.6, citing the case of the Ceylon pearl banks. *See, generally,* Fulton at 612 (concerning acquisition of title by exploiting sedentary fisheries). When this recognized special circumstance of acquisition even in the open ocean is conjoined with the special geographic circumstances of these Sounds, the element of sedentary fisheries has particular importance.

valid in International Law. Report at 24-27. He then analyzed each of Massachusetts' arguments. The first of these was that "it [Massachusetts] is the successor in interest to the perfected title of the Crown." The Special Master correctly identified this as "a claim of ancient title, although it would also support a claim of historic title." Report at 27. This sentence is the key to the scheme of his bifurcated discussion. On pages 27-51 of the Report, the Special Master discusses the elements of a successful claim to ancient title. He finds that if it constituted "county waters" (waters *inter fauces terrae*) Nantucket Sound was granted to Massachusetts by the Crown, which had a proprietary interest in its seabed. Report at 43. Whether the Sound was county waters depended in turn, on the "eyesight test" as formulated by Lord Hale. *Id*. at 46-47. On this final factual issue, the Special Master concluded, on the basis of contemporaneous evidence, "that Nantucket Sound meets the line of sight test of Lord Hale and would have been considered waters *inter fauces terrae* before the Revolution." *Id*. at 51. He went on to state that he could not make the same finding under the "clear beyond doubt standard." Therefore, Massachusetts can prevail only if this extraordinary evidentiary standard is found inapplicable. *Id*. at 51.

The United States concedes, Reply Brief at 2-3 n.3, that what the Special Master was determining, in the Report at 51, was not whether Massachusetts *would have been* entitled to *claim* an ancient title at the time of the Revolution, but, rather, whether such an ancient title had already been perfected *at that time*. But the United States goes on to say that "On the critical issue whether any such title survived the Master was in no doubt. Report 64-65." Those two pages of the Report, particularly the last part thereof, are repeatedly cited and quoted by the United States. *See* Reply Brief at 3, 13, 15, 17, 20. The United States alleges that in this passage, the Special Master found that Massachusetts' ancient title has lapsed by

abandonment or relinquishment. The United States has, however, studiously excluded from consideration or citation the concluding sentence of that section: "The Special Master therefore concludes that Massachusetts has failed to meet its burden of establishing *historic title* to Nantucket Sound." Report at 65-66 (emphasis added). After the care with which the Master distinguished "ancient" from "historic" title, *see* Report at 25, 27, it is absurd to imply that he utilized the latter term to include the former in his summary of the "lapse" discussion.

It is clear, therefore, that the Special Master discussed "lapse" only with respect to the assertion of a *historic* title claim. As we have previously pointed out, the Master had correctly stated that the factual evidence supporting ancient title could also serve as the basis for a historic title claim. Report at 27. Therefore, what the Master dealt with in the Report at 64-66 was whether there was sufficient continuity between the colonial factual basis for ancient title and the subsequent post-colonial events to permit the acquisition of a *historic* title by prescription. He found in the negative on that alternate theory, with no finding that previously *perfected* titles had been abandoned. In so doing, he was in conformance with the well settled rule in International Law governing this distinction, which has been best summarized by a distinguished British scholar and legal advisor to the Foreign Office.

> [The principle of continuity] has two aspects, and it is important to distinguish between them, namely, (a) discontinuity as constituting (or as evidence of) tacit abandonment of title by desuetude, or as leading to loss of title by *derelictio*; and (b) discontinuity as operating to prevent the acquisition of any completed title in the first place, or as evidence that no valid title was ever acquired. In short — if a little paradoxically — continuity may be an element not merely in the retention, but in the establishment, of title.

Fitzmaurice, The Law and Procedure of the International Court of Justice, 32 B.Y.L.C. 20, 66 (1955-56).

It is in Fitzmaurice's sense of lack of continuity in the *establishment* of (historic) title, rather than in the *retention* of (ancient) title, that the Special Master's finding, Report at 65-66, must be understood, unless one assumes, as the United States does, that the Special Master had at that point forgotten the distinction he had previously made painstakingly. *See* Report at 25, 27.

We have not excepted to the Master's findings as to lack of continuity of a *claim* leading to a historic title.[20] The issue of lapse of an already perfected title was never argued, or briefed to, the Special Master, and it therefore hardly surprises that he made no findings in that regard, all the more so since that is a question which, under substantive international law, has its own well established criteria. The United States, the party now advancing this argument at a late point has, significantly, stated the matter in purely conclusory terms by refraining from any discussion as to the substantive law involved. Those substantive elements will now be outlined by us below, briefly, in order to indicate how well justified the Special Master was in *not* making a finding in favor of the United States on this issue. A sovereign title can indeed be lost by abandonment or *derelictio*, but the conditions for such an occurrence have not been met in the case of Nantucket Sound.

Before we proceed, a note on terminology is in order: the United States has spoken of "renunciation", "repudiation", or "relinquishment" on one hand and "abandonment" on the other. Reply Brief at 11-17. Actually, the distinguishing feature between "renunciation" and "abandonment" is that, in the former, the territory involved comes immediately under the jurisdiction

[20] Of course this does not mean that we *agree* with the United States that there was a total "absence" of evidence in Massachusetts' favor as to a historic title. *See* Reply Brief at 5-6.

of another sovereign, whereas, in the case of "abandonment," the territory becomes *res nullius*. Brownlie at 139. Since no one argues that after the Revolution any sovereign displaced Massachusetts and the United States in Nantucket Sound,[21] the term "renunciation" can usefully be omitted from the remainder of the discussion. Other terms used by the United States have no relevant technical meaning in this context, and we understand them as equivalents of "abandonment."

The first aspect of the "abandonment" theory is that it is, indeed, almost entirely a theory. While it is theoretically possible in international law for a sovereign title to territory to be "abandoned," actual instances thereof are exceedingly rare. Hyde at 392. Not the least reason therefor is that the application of the theory is in derogation of stability of titles among nations. The claim that a sovereign nation has abandoned territory can cause international tensions, and, in general, is not favored in application, and ought not to be presumed.[22] *See, e.g.*, Brownlie at 148, 1 Hackworth, Digest of International Law 442.

There are two possible modes of abandonment. First, there is abandonment by mere inaction, or by a failure to maintain or assert some aspect of occupation or sovereignty. Second, there is abandonment by explicit action.[23] The distinction, and the general rule, has been summarized thus:

[21] While it can be argued that the world community acquired certain limited rights in the high seas after the doctrine of freedom of the seas matured, this is certainly not sufficient to constitute it a "sovereign" as is traditionally implied by the use of the term "renunciation." Equally, after that point in time, seabed title could not "revert" to *res nullius* status. Abandonment, strictly speaking, is limited to such situations. Brownlie at 139, Hyde at 392. However, there is no harm in using "abandonment" in the sense the United States does as long as these distinctions have been noted.

[22] On this point, at least, the United States tends to agree: "Perhaps one ought not to *presume* such a retrenchment." Reply Brief at 11 (emphasis in original).

[23] It is in this latter sense of "active" abandonment that the United States seems to have employed the terms of "renunciation," "repudiation," "relinquishment," and "disclaimer" in its Reply Brief.

> However, once a clear title based on occupation is held to have been finally and definitively established, it would seem also to result from the *Clipperton Island* case that *abandonment*, as such, would normally have to be express or manifest, and could only be presumed from mere inactivity if there was a competing claim, or if inactivity was so long continued as to constitute abandonment or to lead to an irresistible inference of intention to abandon, even if only tacit.

Fitzmaurice, 32 B.Y.L.C. at 67 (emphasis in original).

A. *"Passive" Abandonment.*

It cannot be overemphasized that the quantum of occupation or state assertion of jurisdiction required to *retain* a title is a minute fraction of that required to *establish* a title. Thus, very little indeed is required to prevent loss of a perfected title by *derelictio*. *See, e.g.*, Brownlie, *supra*.

The second initial point that must be made is that with respect to abandonment by mere inactivity, under settled international law there can be considerable gaps in time with respect to the continuity of *retention* of title without causing actual abandonment. *See, e.g.*, Fitzmaurice at 68. Subject only to one crucial element (which is found in the case at bar) international tribunals have treated as not significant virtually *total* gaps in occupation or jurisdiction for very extensive periods of time. In each of two leading cases, "gaps" in excess of *two centuries* did not constitute abandonment. *Case of the Minquiers and the Ecréhos*, [1953] I.C.J. Reports 47; *Eastern Greenland Case*, P.C.I.J. Ser. A/B, no. 53, 52 (1933). *See* Fitzmaurice at 68-69, 70 n.2. In the *Eastern Greenland Case*, the Court

even characterized the Royal claims during the two-century gap as mere "pretensions." That contrasts sharply with the facts in the case at bar.

The determinative element (alluded to above) which will permit time gaps of over two centuries without divesting a perfected title is the absence of a competing claim during the time gap. Thus, the *absence* of a competing claim, which is *one* of the elements in evaluating the ripening of a historic claim, *see, e.g., United States* v. *Louisiana (Mississippi Sound Case)*, 105 S.Ct. 1074 (1985), is dispositive where it is alleged that cessation of any factors of occupation, even for a long time, amounts to abandonment.

The following observations are in order as to the present fact situations: first, there has been no suggestion, or any iota of evidence, that after Independence *any* foreign power *ever* asserted a claim to Nantucket Sound, or even, that there was an assertion (by word or deed) by any nation or international body, on behalf of the world community, that the Sound was ever *res communis*. Thus, there is no difficulty in applying the rationale of the *Greenland* and *Minquiers* cases, *supra*, which would permit a lapse of *two centuries* from the date of Independence of the United States without causing abandonment. Second, there was no total cessation in law during the time period in question for Nantucket Sound as there was in the two cases cited, so that, in the case of Nantucket, the argument for *retention* of title is very much stronger. We now proceed to outline the distinguishing features characterizing the post-colonial history of the Sound.

We have already discussed above in some detail in response to the United States' two "threshold questions" why the Special Master was correct in finding that there had been effective occupation of Nantucket Sound in colonial times. In summary, what the Master found to be the unique historical geography of the Sound, including the intensive and exclusive exploration

of its resources by the colonists, was contemporaneous with the other attributes of sovereignty and occupation, namely discovery, and the political and legal assertions of ownership over the territory (the colonial charters and the county waters *inter fauces terrae* doctrine).

With that in mind, it is hard to see how occupation or sovereignty of the Sound can be said to have ended after Independence, and a passive abandonment taken place: (a) discovery of the Sound in issue is a historical fact and has not changed since Independence; (b) the territory in question belonged to the Crown, and, even if it did not pass by charter (as the Special Master found) it passed to Massachusetts by virtue of the Definitive Treaty of Paris in 1783, *see Mahler* v. *Norwich and N.Y. Transportation Co.*, 35 N.Y. 352 (1866); (c) the *inter fauces terrae* line of sight test as defined by Lord Hale was the manifested position of the United States in foreign affairs in the Nineteenth Century; and finally, (d) the unique political economy and historical geography of the Sound did not change after Independence. The intensive, exclusive exploitation of the entire Sound by the inhabitants of the contiguous enclosing *terra firma* has continued into the Twentieth Century. No showing has been attempted, let alone made, that it ceased in the Eighteenth Century or thereafter.[24]

It has been adjudicated (as noted above) that significantly less activity and political assertions than are present in the case of Nantucket Sound, for a period of two centuries, will not cause abandonment. To this must be added the effect of a doctrine which, in the context of Nantucket Sound, makes a finding of abandonment even less supportable. This doctrine

[24] The *only* economic activity that attenuated within the Sound was whaling after 1750, as the Special Master noted. Report at 54. But this was only *one* of the economic activities discussed, and sedentary and other fisheries continued unabated. No *animus* of abandonment can therefore be implied from the demise of whaling, which resulted from the exhaustion of the resource involved.

deals with the practical issue of whether territory, even if *deserted*, remains subject to the power of the sovereign to assert "unmolested supremacy" in the area, if it so wished. This depends both on geographical considerations and on the military power of the sovereign. The principle has been delineated thus by Professor Hyde:[25]

> When a State appears voluntarily to have deserted territory the control of which constantly remains within its grasp, abandonment should not be deemed to have taken place without ample proof of a design to give up all rights of property and control.
>
> Abandonment as a process of law is not, however, believed to be wholly dependent upon the design of the State acknowledged to have been the territorial sovereign of a particular area. Its action or inaction may have been such as to convince the impartial mind that that sovereign is not in a position to deny that it has given up its rights. Nevertheless, the conditions that would compel such a conclusion must depend upon the circumstances of the particular case, and must be expected to be influenced by the geographical relationship of the territory concerned to that of the alleged abandoner, and also by the existence of its power at all times to assert unmolested supremacy within the area concerned. Where the retention of such power is obvious, long-continued,

[25] Professor Charles Hyde's International Law Chiefly As Interpreted and Applied by the United States, is one of the few sources mentioned by name in Brownlie, see Brownlie at 25, as examples of publications of such authority that they are in themselves a source of international law pursuant to the Statutes of the International Court of Justice.

> and uninterrupted, evidence of affirmative action indicative of a design to surrender might be fairly regarded as essential in order to produce an extinction of the right of sovereignty.

We submit that the "power" of the United States of America to "assert unmolested supremacy" over Nantucket Sound has indeed been "obvious, long continued and uninterrupted." This military and geopolitical obstacle to any theoretical adverse claimant (coupled with the historical nonexistence of any such adverse claimant) would seem to rule out abandonment by mere inactivity in the post-colonial period in Nantucket Sound. What is therefore required is "evidence of *affirmative* action indicative of a design to surrender." We now proceed to demonstrate that the record in this case contains no such *affirmative* evidence.

B. *The United States' Argument of Abandonment by Affirmative Acts Since Independence.*

In one form or another the bulk of the remainder of the United States' Reply Brief is devoted to the proposition that by some means or other, Nantucket Sound was relinquished, renounced, repudiated, or disclaimed subsequent to Independence.

Again, it is important to note what the Special Master found, rather than what the United States infers. The Special Master did *not* find that an ancient title, if perfected, had been "abandoned," "relinquished," "repudiated," "renounced" or "disclaimed." The Special Master discussed whether a prescriptive title had been perfected, and not whether an ancient title had been *retained*, during that period. As to any "disclaimer," in the sense the term has been used by the Court in previous cases, the Master explicitly found against the United States on

several grounds. Report at 13-20, 69.3-69.4. *See also* Brief in Support of Massachusetts Exception at 20-23. The United States now raises a large array of objections to this finding.

1. Alleged Abandonment by the United States.

The United States alleges that, by a variety of actions, it has repudiated or disclaimed Massachusetts' ancient title.

We must first distinguish between judicial and foreign affairs manifestations of the alleged United States position after Independence. As to the former, it seems undisputed at this point that the rule in England was that of Hale. Accordingly, since the common law of England was the common law of the United States and its several states until changed by statute or judicial decision, we must inquire what the first American judicial treatment was. The first American case to deal with the Coke versus Hale question was a United States court, sitting in Boston, in 1829. *United States* v. *Grush, supra,* discussed in Report at 44-45. The United States has conceded that the English rule favored Hale. Judge Story, in *Grush*, favored Coke. The United States represents that the parties agree on the basis of this decision that the Coke test was the American position "from the first." Reply Brief at 13 n.11. That representation is incorrect. Furthermore, this Court has indicated that assertions of criminal jurisdiction do not constitute a historic title claim. *See United States* v. *California*, 381 U.S. 139, 174-175 (1965). That being so, it is difficult to see why they should constitute a "disclaimer" or renunciation of historic title, and still less of a perfected ancient title. To put the matter differently, the judicial decisions on which the United States relies dealt only with aspects of federal-state or intrastate curial jurisdiction. Even if, *arguendo*, other nations were aware of them[26] (which the United States has

[26] *Manchester* v. *Massachusetts* is a special instance, which will be discussed separately below. Suffice it to say here that we have never relied on the *Man-*

not attempted to show), these decisions did not purport to, nor could they, disclaim or renounce a title to seabed already perfected under international law.

The next instance of a federal "disclaimer" suggested by the United States are the early United States customs statutes discussed by the Special Master in the Report at 62-64. The Special Master may have been correct in deeming it significant that these acts did not explicitly designate Nantucket Sound as one or more customs districts, but he did so in the context of an inquiry into a historic title claim, not ancient title abandonment. It can hardly be argued that Congress intended to *abandon* any territory merely by failing to designate the area as a customs district. That such omission cannot be construed in such an affirmative sense seems clear from the case of Long Island Sound. That Sound is acknowledged by the United States and by its Coastline Committee to be a historic bay. The roots of the claim are followed back to colonial times. *See Mahler*, 35 N.Y. at 912-913, discussed in the Report at 37-42. Yet Long Island Sound was not designated a customs district,[27] and under the extreme position of the United States in this litigation, that fact would have "repudiated" any establishment of title in the colonial era, and further, would have, in ongoing fashion, acted as an absolute barrier to the ripening of any historic title claim in the Federal period.

---

chester decision *per se*, but on the fact that the text of the decision quoted the relevant state statutes and stated the location of the relevant large scale charts. *Manchester* was not the claim, but pointed the reader to the actual claim.

[27] This follows from a reading of the statute dealing with *both* the Connecticut shore and the Long Island North Shore. As to the latter, the statute refers to "waters", but with respect to Connecticut, it does not. Accordingly, the reference to "waters" for the Long Island side must be construed as referring to the smaller bays indenting Long Island, rather than the Sound proper. An opposite construction would lead to the absurd result that the New York district went all the way across the Sound up to the Connecticut tidemark.

The next argument by the United States, that it is the Sound's status as a geographical strait that automatically subjects it to an alleged blanket disclaimer by the United States, arises out of a single statement by the Secretary of State in 1886. *See* Reply Brief at 18-19. Here again, the United States, contrary to the Special Master's explicit order, first raised this issue in its Post-Trial Reply Brief. As a result, the Special Master allowed Massachusetts a four-page post-argument memorandum in rebuttal. Moreover, the United States did not at trial develop the facts needed to support its legal theory.

First, is the issue of "cul-de-sacs": literally, that means a dead end, and a geographic strait can never be a true dead end, by definition. Accordingly, the commonsense use of the term in this context, if it is to mean anything at all, is to differentiate between a strait which is useful for communication between different parts of the high seas (such as the straits of Gibralter, the straits of Hormuz, and the Dardanelles) and a strait whose primary function is to serve as a conduit for navigation to and from inland ports and waters on one hand, and the high seas on the other.

Nantucket Sound fits into the latter category. Historically, to the extent it was utilized by foreign flag vessels at all, it was used for access or egress from a United States port in North-South coastal traffic and thus for the benefit of national maritime commerce of the United States. Tr. 1019. Until modern times, a captain who was not going to or from a northeastern coastal port would have avoided the Sound (given its shifting and treacherous shoals and the need for a pilot) and would have given Cape Cod and its dangerous shoals a wide berth. In modern times, even coastal traffic largely ceased, since as one witness, a former naval officer, testified, a captain "would be virtually out of his senses" to go through the Sound rather than the Cape Cod Canal. Tr. 1017. *See* Report at 67.

The United States had an opportunity to attempt to develop the historical and geographic-hydrological facts needed to support their interpretation. They failed to do so, and should not be allowed to develop their case by assumption, or invite the Court to do so at this late date.

As for the United States' reliance upon the Corfu Channel decision, we submit that the Master correctly understood that decision as the passage quoted by the United States, Reply Brief at 18 n.14 demonstrates in its identification of one "decisive criterion" as "the fact of its [the strait's] being used for international navigation." The Special Master did not emphasize the "volume" of international traffic as the United States suggests. If the strait is not in fact used for international traffic, it cannot have any "importance" for that purpose.

In that connection, even as to the period before the opening of the Cape Cod Canal in 1914 (see Report at 67), the United States was obligated to adduce *concrete* evidence as to the amount of *foreign* shipping traffic (and, we submit, its route and destination). *United States* v. *California*, 381 U.S. 139, 171-172 (1964).[28] It did not do so.

As Professor Hyde has succinctly pointed out, "If there have been 'historic bays' there have also been 'historic straits . . .'." That crucial point is ignored by the United States in its argument. We submit that the United States has not demonstrated (as it must if it wishes to prevail on this issue) that its consistent and unequivocal foreign affairs position, effectively communicated to other nations, that it disclaims all geographical straits that do *not* meet its present "cul-de-sac" formulation and which

[28] Since the Court's discussion dealt with a "fictitious bay" — not a historic bay — argument, even factual proof in the present case of international shipping would not be determinative, nor would it have overcome the effect of the United States' 1930 reservation, which is discussed below.

have been used by international shipping to some degree, no matter how slight. The record demonstrates the opposite.[29]

The United States argues that the Master's findings as to the effect of the COLREG lines on the alleged disclaimer are incorrect because the Coast Guard lines were allegedly published on the same large scale charts which showed the territorial sea lines. Reply Brief at 20 n.16. This is an argument that the United States did not see fit to make to the Special Master. In any event, the United States did not introduce evidence demonstrating that throughout the time period discussed by the Special Master (Report at 16-18) *all* editions of the government charts covering this area in print from time to time, displayed both types of lines.[30] In the same footnote, the United States argues that the Master's findings were incorrect because once the Coast Guard lines were changed in 1979, they no longer showed Nantucket Sound as inland. However, this ignores the Master's detailed findings that the change was brought about by the Justice Department to bring the Coast Guard lines "into accord with the litigation posture of the United States" in the present proceedings. Report at 18.

Second, there is the matter of the alleged position of Mr. Pearcy, the late Geographer of the State Department, in a 1959 article. *See* Reply Brief at 20, *discussing*, Pearcy, Measurement of the U.S. Territorial Sea, 40 Dept. St. Bull. 963 (1959). According to the United States, "the status of the Sound was made explicit" through that article, and constituted "an unambiguous disclaimer of the Sound long before the recently published charts." The article is neither unambiguous, nor, for that matter, a disclaimer.

[29] *See, inter alia*, the discussion of the United States' 1930 Geneva reservation in this regard, *infra* at 40.

[30] For example, the mere showing of one chart containing both lines would not substantiate the government's argument, unless it was also shown that this chart was the current edition throughout the period July 15, 1977 and April 16, 1979.

The United States has been very reticient in this litigation with respect to this newest of arguments. First, this alleged disclaimer was not specifically identified by the United States in discovery in response to a direct, specific request by Massachusetts. The article was not one of the large number of exhibits introduced by the United States at trial.[31] Contrary to the Special Master's directions in this regard, not a word was heard about this argument until the United States' post-trial reply brief, where a brief quotation was merely mentioned in passing. The Special Master, accordingly, very appropriately considered it not to merit discussion.

There are, of course, important preliminary questions concerning this article, which the United States has carefully shielded from resolution during trial. In what capacity did Mr. Pearcy write this article? Did the positions therein represent his own professional viewpoint or that of the Department? Was he authorized to *disclaim* marine territory of the United States? Was his position reviewed by the Secretary or his designee? Would foreign nations have been justified in interpreting this as a *disclaimer* by the United States?

The answer to some of these questions can be found in the article itself. It must be doubted that Mr. Pearcy was articulating the official foreign affairs position of the United States, in view of his discussion of the applicability of the "straight base line method" under the Convention. Pearcy at 971. He identifies the southeast coast of Alaska as "requiring the use of a straight baseline." And he describes the coast of Maine, the Florida Keys, and the Mississippi Delta as "sufficiently complex to give pause to [*sic*] a consideration of the use of this method." As we understand the official foreign affairs position of the United States, as alleged in this and other seabed

[31] The United States in fact relied only upon a quotation from Pearcy in a secondary source. Our own analysis considers the entire Pearcy article.

litigation, the United States has unequivocally declined to adopt this optional method of baseline delimitation though it is permitted by the Convention. *See* Report at 6.

Finally, the passage quoted from this article, Reply Brief at 20, is most ambiguous in this context. Mr. Pearcy's description is not "wholly inapposite if the Sound was inland water." He merely states that Martha's Vineyard's territorial sea "coalesces" with that of the mainland and Nantucket, but that would be the case if both Vineyard and Nantucket Sounds were enclosed. A glance at the map addendum to Massachusetts' Brief makes this evident. Nantucket's territorial sea would coalesce with that of Cape Cod by means of the territorial sea long the Monomoy-Nantucket closing line, and the Vineyard's territorial sea would coalesce with the mainland likewise, and also, by another route, along the closing line from Gay Head to Cuttyhunk Island and from there to the mainland. Mr. Pearcy uses the word "coalesce" in the broadest sense (not merely as denoting "overlapping"), since, for example, he states that the territorial seas of the Vineyard and Nantucket Islands "coalesce." To the extent it can be said they do, it is only by utilizing "islands" or "construction points" between these two large islands: each of the former, under the Convention, have their own three mile territorial seas. *See e.g.*, United States Exhibit 9.

It is not productive to argue exactly *what* Mr. Pearcy meant — if there was room for argument, as we submit, then there cannot have been a purported disclaimer, which of necessity must be ambiguous.

2. Allegations that Massachusetts Itself Disclaimed Title to Nantucket Sound.

There is no need to discuss separately the supposed impact of Massachusetts state court decisions favoring the Coke over

the Hale test. Our rebuttal to the United States' argument concerning like federal decisions applies equally here.

The United States next refers to Massachusetts legislation in 1859 as disclaiming Nantucket Sound, since it establishes a two league (six nautical mile) standard for enclosing arms of the sea. However, as was argued in detail to the Special Master, this act was passed in response to a state court decision to the effect that on the open sea (as in England), the county's jurisdiction ended at the water's edge. Post Trial Reply Memorandum for the Commonwealth 56-62. Concerned with this serious gap in criminal jurisdiction, the legislature's primary purpose was to extend the criminal jurisdiction of the county courts to the seaward limit of state jurisdiction. No intent on the part of the legislature to *abandon* vested title to inland waters can be inferred.[32]

More important, however, in the present context, is the issue of whether Massachusetts had the constitutional authority to repudiate inland waters in the national domain, and whether foreign governments, without inquiry of the national sovereign, could have relied thereon. In any event, there is no showing whatsoever by the United States that *any* foreign nation would have become aware of the 1859 Massachusetts statute prior to the Twentieth Century, as a result of the *Manchester* decision. *See* Report at 60. If, after World War I, a foreign nation became aware, because of that decision, of the text of the 1859 law, it would also have been charged with knowledge of

[32] For example, as we previously pointed out, this Court in *Manchester* v. *Massachusetts* affirmed that Massachusetts had obtained Buzzards Bay through its colonial charter. 139 U.S. at 256. Buzzard's Bay barely meets the six mile test of the 1859 statute, and, had it not, one could hardly infer the intent of the Massachusetts legislature to "abandon" this title. Further, the 1932 fisheries legislation, which the Special Master found applied to the entire Sound (Report at 69.2) also shows that the Massachusetts legislature did not deem its jurisdiction over the center of the Sound to have been "abandoned."

the large scale Massachusetts charts showing its closing lines. *See* Report at 60. The relevant chart (Mass. Ex. 4) reveals a striking ambivalence: While Vineyard Sound is closed off at its Eastern end (less than six miles) it is *open* at the Nantucket Sound end. But high seas status for Nantucket Sound (as argued by the United States) would have necessitated a closing line at the Vineyard Sound juncture.

The ambivalence is shown by another official Massachusetts map discussed by the Special Master (Report at 65), which is Exhibit E to his Report. That map, published *after* the 1859 statute was enacted, nevertheless shows "median line treatment" for county waters within Nantucket Sound (even though, as the Master correctly noted, it did not designate the Sound as county waters). It seems clear county jurisdiction median line treatment in the Sound (between Nantucket and the mainland) would be inapplicable if that Sound were high seas.[33]

Thus, while the Special Master may well have been correct in finding that these Massachusetts charts and maps do not justify a contemporaneous historic waters claim, the United States is incorrect in assuming that these charts are sufficiently unambiguous as to Nantucket Sound to evidence an abandonment of a vested title.[34]

The United States asserts that Massachusetts "continually reaffirmed" the "explicit disclaimer" of the 1859 Act for "well over a century." Reply Brief at 15. We have shown above that the 1859 Act and the 1881 charts did not and could not "renounce" or "disclaim" Nantucket Sound. Apart from the Act and the charts, the only evidence cited by the United States to support its extravagant assertion concerns reports prepared by various state officials in 1968 and 1969 to support legislative

[33] An Examination of Appendix E will show that the "median line" extends into the center of the Sound much further than the three mile limit.

[34] Again, assuming that Massachusetts *could* have abandoned such a title had it wanted to.

proposals. *See* Reply Brief at 15-16 n.13. According to the United States, these exhibits show acceptance of the United States' alleged position that Nantucket Sound was not inland waters.[35]

We begin our response, once again, with an objection. What the United States argues is a capsule version of its own much more detailed contentions before the Special Master, to which Massachusetts responded at length, and which the Special Master evidently deemed so lacking in merit as not even to require discussion.[36] At this stage in the proceedings, it is incumbent upon the United States, if it insists upon an evidentiary argument which has been considered and rejected by the Special Master, to do more than simply reiterate its own side of the argument, especially in so condensed and conclusory a form.

For example, the United States notes that the Governor's Conference on Massachusetts' Stake in the Ocean, and the then Attorney General of Massachusetts, both recommended legislation extending Massachusetts' boundaries to the limits permitted by the Convention. Both acknowledged that the geographical tests employed by the Convention would not enclose Nantucket Sound, and the United States infers that Massachusetts therefore acknowledged that the Sound is not inland waters. What the United States omits to mention, how-

[35] Although we believe that the United States misconstrues these reports and, further, that it attributes to them a weight and prominence which, in context, they do not have, even if the United States had correctly described them it is inconceivable that these isolated statements to the Massachusetts legislature could have international significance. Still less could they operate as an effective renunciation: there is not the slightest evidence that these reports circulated beyond the walls of the Massachusetts State House.

[36] The United States' argument in the Reply Brief at 15 n.13 is a highly condensed version of the argument made in its initial post-trial brief to the Special Master at 58-66. Massachusetts responded to the argument in its post-trial reply memorandum to the Special Master at 67-76.

ever, is the fact that neither the Conference nor the Attorney General purported to determine whether the Sound is historic inland waters.

Furthermore, the United States also omits to mention the almost contemporaneous conclusion of a special legislative commission, in 1971, that Nantucket Sound qualifies as historic waters under the Convention.[37] By statute in 1971, the Commonwealth explicitly enclosed Nantucket Sound within its marine boundaries. St. 1971, c. 1035.

More could be said in response to this argument, but what has been said suffices to show that the Special Master assessed the argument realistically when he passed it over in silence.

3. The Record Contains Evidence Contradicting the United States' Argument.

The United States, far from following Lord Coke's test "from the first," manifested its support for Lord Hale's test. The first indication was the letter by Attorney General Randolph in 1793 (discussed in the Report at 34-37). That opinion dealt with the legal status of Delaware Bay, and analogized to the situation in Chesapeake Bay, as follows: "Nay, unless these positions can be maintained, the bay of Chesapeake, which, in the same law, is so fully assumed to be within the United States, and which, *for the length of the Virginia territory, is subject to the process of several counties to any extent,* will become a rendezvous to all the world, without any possible control from the United States." Quoted in Moore, Digest, § 153 at 7348 (emphasis added).

It should be recalled that under the common law, the jurisdiction of the county stopped at the sea shore, unless the waters were county waters by virtue of being *inter fauces terrae*. *See, e.g.*, Fulton at 547, *quoted in* Report at 31. Chesapeake Bay

[37] Fifth Report of the Special Legislative Commission on Marine Boundaries and Resources, 4 Sen. Rep. 1580 (Sept. 20, 1971), U.S. Exhibit 52.

is 9.5 nautical miles wide at its entrance (between Cape Henry and and the Issacs). Hyde, § 146 at 470. There is no way that the application of the Coke test could have enclosed that Bay (*see, e.g.*, Report at 498 as to the limits of that test) and, therefore, the applicable test must have been that of Hale. Had Chesapeake Bay not been enclosed by means of this test, there could, under prevailing law, have been no county waters therein, nor any talk by the Attorney General of the "process" of counties therein.

Attorney General Randolph's opinion resulted in a communication from Secretary of State Thomas Jefferson to the foreign powers involved. Report at 35. The United States has admitted that the contents of the opinion were "notified to the world community." Reply Brief at 18. England, as has been previously shown, adhered to the Hale test, and, accordingly, would have had no grounds for taking issue with the preference for Hale indicated by the Randolph opinion.

The United States' preference for the Hale test was subsequently, and even more explicitly, manifested in a letter from Thomas Jefferson, by then President of the United States. In his September 8, 1804 letter to the Secretary of the Treasury, Jefferson dealt with the subject of British vessels off New York and the proper method of delimiting inland waters and the territorial sea of the United States beyond:

> [I]t will be necessary for us to say to them with certainty which specific aggressions were committed within the common law, which within the admiralty jurisdiction, & which on the high seas. The rule of the common law is that whenever you can see from land to land, all the water within the line of sight is in the body of the adjacent county & within common law jurisdiction. Thus, if in this curvature *acb* you can see from *a* to *b*, all the water within the line of

> sight is within common law jurisdiction, & a murder committed at *c* is to be tried as at common law. Our coast is generally visible, I believe, by the time you get within about 25 miles. I suppose that at N York you must be some miles out of the Hook before the opposite shores recede 25. miles from each other. The 3 miles of maritime jurisdiction is always to be counted from this line of sight.

Mass. Exhibit 110.

The United States, in its post-trial reply brief to the Special Master at 18 responded to this point with a quotation from Jessup to the effect that "it is believed that" this letter by Jefferson was not communicated to any foreign powers and therefore did not represent a diplomatic position. Jessup cites no support for this "belief," and it seems tendentious in the context of the position Jessup is developing. The content of, and circumstances surrounding, the Jefferson letter clearly imply the contrary. Since depredations of British ships were concerned, it would be surprising if the President's position had *not* been communicated to that power, if only orally. Also, Jessup failed to take into account the content of the Randolph opinion, discussed above, and Jefferson's connection therewith, as then Secretary of State.

Considering, therefore, the fact that straits *were* capable of expropriation, *see* Report at 35-36, 62-63,[38] and that the test for delimitation favored in the federal period was the broader "Hale" test, there is no indication of an American intent to abandon any vested title to Nantucket Sound.

Moreover, there is further evidence negating an affirmative abandonment by the United States, of a more general nature.

[38] "However a close reading of the Opinion shows that Randolph considered sounds and straits to be as susceptible of an assertion of United States jurisdiction as bays."

In 1930, the United States introduced a reservation at the 1930 Geneva Codification proceedings (see Mass. Exhibits 121 and 122): "(C) Waters, whether called bays, sounds, straits or by some other name, which have been under the jurisdiction of the coastal state as part of its interior waters, are deemed to continue a part thereof."[39]

The clear position of the United States expressed in its reservation (which could not have received wider circulation internationally) is that irrespective of any emerging or enacted rules of international law, it was retaining and reaffirming title that it already possessed.[40] Indeed, this 1930 reservation has been aptly described by a leading commentator as manifesting the doctrine of *uti possidetis*.[41] Hyde at 478. It is also significant that the doctrine is primarily utilized (in South America, Asia, and Africa) to preserve colonial (pre-independence) lines and boundaries. Brownlie at 137-138.

Thus, on the basis of the foregoing, the assertions by the United States that it has consistently, in foreign affairs, "disclaimed title to the Sound as inland" and that this is "a consistent stance dating back almost two centuries," Reply Brief at 17, are simply contrary to fact.

In conclusion, all the factors claimed by the United States to constitute, in effect, active abandonment of title to Nantucket Sound may operate to prevent the *ripening* of a prescriptive

---

[39] Since the codification, ultimately, was not adopted internationally, a provision for the publication and circulation of large scale charts was never implemented.

[40] We think it noteworthy that we have in these proceedings several times orally and in writing quoted this reservation and invited the United States to reconcile it with their allegation of the "consistent" U.S. position. The United States has *never* referred to this instrument, however.

[41] From the decree of the Praetor in Roman Law: "*Uti possidetis, ita possideatis* ("As you possess, so may you possess"). Hyde at 501 n.8.

claim; they can not, under the standards of international law, affect the *retention* of an ancient title, already perfected.

Conclusion.

We have not responded to the United States' argument dealing with the burden of proof issue since the nature of this brief would seem to preclude that. However, we respectfully submit that the determinative issue remains whether the Court should apply the "clear beyond doubt" standard or whether the Special Master's alternate finding on Nantucket Sound should be adopted. For the reasons we have previously stated in our first brief, we respectfully pray for judgment in Massachusetts' favor on that issue.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,

HENRY HERRMANN,
Special Assistant Attorney General,

WILLIAM L. PARDEE,
Assistant Attorney General.